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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN DANTE MIMS,

Defendant and Appellant.

A125155

(Alameda County
Super. Ct. No. C152345)

A jury convicted Jonathan Dante Mims (Mims) of one count of carjacking (Pen. Code, § 215, subd. (a)),¹ one count of second degree robbery (§ 211), and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)). The jury found true the allegations that Mims personally used a firearm in the commission of the robbery and carjacking offenses. Mims contends that the evidence is insufficient to sustain his conviction for carjacking. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mims was charged by information with one count of murder (§ 187, subd. (a); count one), two counts of possession of a firearm by a felon (§ 12021, subd. (a)(1); counts two and five), one count of carjacking (§ 215, subd. (a); count three), and one count of second degree robbery (§ 211; count four). With respect to counts three and four, it was further alleged that Mims personally used a firearm within the meaning of sections 12022.5, subdivision (a) and 12022.53, subdivision (b). It was also alleged that

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

Mims had previously suffered two felony convictions, for which he served prior prison terms within the meaning of section 667.5, subdivision (b). Mims was tried by jury and convicted on counts three, four, and five. The enhancement allegations were also found true. The jury found Mims not guilty on counts one and two. Mims admitted the state prison prior conviction allegations.

Because Mims does not challenge the sufficiency of the evidence to convict him of robbery, or of being a felon in possession of a firearm, and since he challenges the sufficiency of the evidence only as to a single element of the carjacking charge, we focus our attention on the evidence relevant to that conviction.

Prosecution's Case

Michelle Survine (Survine) testified that, on the afternoon of August 22, 2005, she drove her Oldsmobile to a friend's apartment building at 1928 96th Avenue, near the intersection of 96th Avenue and Olive Street in Oakland. Survine parked her car in the driveway. While talking with her friend in the parking lot of the apartment building, Survine saw Mims walk by approximately three times.² Survine then walked to a corner store about half a block away, at 96th Avenue and Birch Street, to get some dog food. As Survine walked to the store, she looked back and noticed that Mims was walking behind her. Survine saw Mims put what appeared to be a nine millimeter handgun into his pocket.

As Survine approached the entry to the store, Mims pushed her, face first, up against a wall and put the gun to her head. Mims warned her to stay away from 96th Avenue or she would end up getting hurt or killed just like her husband.³ Mims then ripped several necklaces from Survine's neck, took money from her pocket, and told her “ ‘[g]ive me those keys because I'm taking your car.’ ” Mims took Survine's keys from

² She recognized Mims because he had introduced himself to Survine about a month earlier.

³ Survine had been married to Kevin Survine, who was shot and killed in the same neighborhood on September 22, 2004. Mims was charged with Kevin Survine's murder in the proceedings below, but as noted, was acquitted of that charge.

her hand and told her that he would kill her if she called the police. At the time, Survine's car remained parked in the driveway at 1928 96th Avenue. Survine testified that she was half a block away from her car, or about a three to four minute walk. After taking Survine's keys, Mims walked back towards her car. Survine did not see Mims get into her car but did see her car back out of the driveway and pull away as she was standing on the corner of 96th and Olive.⁴

Survine later called the police. Her car was located, but had been stripped of many of its parts.

Defense Case

A defense investigator testified that, on March 23, 2009, she parked her car in the driveway at 1928 96th Avenue, which is located midblock between Birch and Olive streets. The defense investigator calculated that it was about 175 steps between 1928 96th Avenue and the corner store at 96th Avenue and Birch Street. She testified that she was unable to see her parked vehicle from the corner store. The defense investigator conceded, on cross-examination, that she did not see Survine park her car on August 22, 2005, or know whether a fence had been similarly located at the time.

⁴ The record is not clear on why Survine did not see Mims enter her car. Contrary to Mims's assertion, Survine did not testify that she was too far away to see Mims get into her car. Survine's testimony is ambiguous regarding her location after Mims walked away with her keys. Initially, she was asked "[d]id you do anything like follow him to try to see if you could stop him?" Survine responded: "No, I didn't try to do anything. I just stood there for a minute. Then I called my cousin Carol, and she was like, 'Call the police.' And I told her that I didn't want to because he told me if I call the police, I probably get killed, and I was still over there by myself without my car." The following exchange appears later in the record: "Q. . . . So you see the defendant walk away, and he goes in what direction? [¶] A. He goes to the left of me down the street to my car. [¶] Q. And then what do you see? [¶] A. I see my car backing out the driveway going straight up the street to 96th and Sunnyside and making a left. [¶] . . . [¶] Q. Did you see him actually get into the car? [¶] A. No, I didn't actually see him get into the car. [¶] Q. . . . So you're standing on the corner now of *96th and Olive*? [¶] A. Uh-huh. [¶] Q. Is that a yes? [¶] A. Yes. [¶] . . . [¶] Q. So the next thing you do is call your cousin? [¶] A. I called my cousin." (Italics added.) We view the evidence in the light most favorable to the prosecution.

Following his conviction, Mims was sentenced to state prison for an aggregate term of 21 years 8 months. He filed a timely notice of appeal.

II. DISCUSSION

Mims's sole argument on appeal is that his conviction for carjacking must be reversed because there was insufficient evidence that the car was taken from Survine's immediate presence. " 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or *immediate presence*, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a), italics added.) Mims argues that the "immediate presence" element was not proven because Survine did not see Mims enter her car and was half a block away from her car when Mims took her car keys.

We first observe that Mims does not challenge the instruction given to the jury on the necessary elements of the carjacking charge, including the requirement that the vehicle be taken from the victim's person or his or her immediate presence. (CALCRIM No. 1650.)⁵ Thus, the only question we consider is whether substantial evidence supports

⁵ The instruction given by the court read: "The defendant is charged in Count 3 with carjacking in violation of . . . section 215. To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a motor vehicle that was not his own; [¶] 2. The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger; [¶] 3. The vehicle was taken against that person's will; [¶] 4. The defendant used force or fear to take the vehicle or to prevent that person from resisting; [¶] AND [¶] 5. When the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle either temporarily or permanently. [¶] A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short. [¶] *Fear*, as used here, means fear of injury to the person himself or herself. [¶] *A vehicle is within a person's immediate presence if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear.*" (Final italics added.)

In the trial court Mims proposed a modification to CALCRIM No. 1650 to define "immediate presence" as "an area which is near at hand, not far apart or distant, within which the victim could reasonable [*sic*] be expected to exercise some physical control of

the jury’s implicit determination that Survine’s vehicle was taken from her “immediate presence.”

Evidence of Immediate Presence

In determining the sufficiency of the evidence, we “ ‘must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citations.]” (*People v. Johnson* (1980) 26 Cal.3d 557, 576–577.) “Evidence, to be ‘substantial’ must be ‘of ponderable legal significance . . . reasonable in nature, credible, and of solid value.’ [Citations.]” (*Id.* at p. 576.)

The contours of the “immediate presence” requirement have been explored in several robbery and carjacking cases.⁶ In *People v. Hayes* (1990) 52 Cal.3d 577, the Supreme Court stated that “ ‘ “[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.” ’ [Citations.]” (*Id.* at pp. 626–627, last brackets added.) Thus, “immediate presence” is “ ‘ “an area within which the victim could reasonably be expected to exercise some physical control over [the] property.” ’ [Citation.]” (*Id.* at p. 627.) The *Hayes* court concluded that the immediate presence requirement in a robbery case could reasonably be deemed satisfied when the victim was assaulted and killed 107 feet away from the motel office from which property was later taken. (*Id.* at pp. 628–629, 631.) The court reasoned: “The distance between these two locations . . . was not so great that the manager would necessarily have been unable to see or hear an attempt to break into the office or to return to the office in time to resist such an attempt.” (*Id.* at p. 631.)

the vehicle,” citing *People v. Medina* (1995) 39 Cal.App.4th 643, 648 (*Medina*). The instruction was refused. Mims does not raise the issue here.

⁶ Robbery is statutorily defined as “the felonious taking of personal property in the possession of another, from his person or *immediate presence*, and against his will, accomplished by means of force or fear.” (§ 211, italics added.)

In *People v. Medina*, *supra*, 39 Cal.App.4th 643, the *Hayes* definition of “immediate presence” was extended to carjacking. (*Id.* at pp. 648–651.) The court noted that “[t]he [carjacking] statute does not require that the victim be inside or touching the vehicle at the time of the taking.” (*Id.* at p. 650.) In *Medina*, the defendants lured the victim from his car to a motel room, handcuffed him, took his car keys, and then took his car, which was parked approximately 20 feet away in the motel parking lot. The Fifth District Court of Appeal held that this evidence was sufficient to satisfy the “immediate presence” requirement. (*Id.* at pp. 646–647, 651–652.) The court reasoned: “[T]he clear nature of the theft involved here as one committed by ‘trick or device’ makes it unnecessary for us to any more specifically define the parameters of ‘immediate presence’ in the context of a carjacking. . . . In the context of a robbery it has been held, ‘ “*The trick or device by which the physical presence of the [victim] was detached from the property under his [possession] and control should not avail defendant in his claim that the property was not taken from the ‘immediate presence’ of the victim.*” ’ ” [Citation.] [¶] Here the defendant planned a forceful taking of [the victim’s] car The only reason [the victim] was not in the car when it was taken and this was not a ‘classic’ carjacking, was because he had been lured away from it by trick or device. There is no reason to not apply the trick-or-device robbery rule in such a situation.” (*Id.* at pp. 651–652.)

Similarly, in *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), the defendant entered a jewelry store displaying a gun, took the victim’s car keys, tied her up inside the back office, and then took her car from the store’s parking lot. These facts were deemed sufficient to establish the “immediate presence” element of carjacking. (*Id.* at pp. 602, 608–609.) The *Hoard* court reasoned: “Although [the victim] was not physically present in the parking lot when [the defendant] drove the car away, she had been forced to relinquish her car keys. Otherwise, she could have kept possession and control of the keys and her car. Although not the ‘classic’ carjacking scenario, it was a carjacking all the same.” (*Ibid.*)

Here, the jury was correctly instructed that “[a] vehicle is within a person’s immediate presence if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear.” Survine was only half a block away from where she had parked her car and was in physical control of the car keys until Mims took them from her hand, at gunpoint. After Mims walked away with her keys, Survine was able to return to 96th Avenue and Olive Street by the time Mims drove away.

Given this evidence, a reasonable finder of fact could conclude that Survine was in an area in which she could have exercised control over her vehicle, had her keys not been wrested from her at gunpoint, and had she not been overcome by violence or prevented from exercising control by fear. The fact that Survine did not see Mims enter her car is not determinative. The victim in *Hoard* did not see the defendant’s entry to her vehicle and the “immediate presence” requirement was nonetheless satisfied. (*Hoard, supra*, 103 Cal.App.4th at pp. 602, 608–609.) In any event, Survine did see her car being driven away. Accordingly, we conclude that substantial evidence supports the finding implicit in the jury’s verdict—that the car was taken from Survine’s immediate presence.

Legislative Intent

While not directly challenging the jury instructions, Mims nevertheless argues that the *Hoard* court’s interpretation of “immediate presence” is contrary to legislative intent and renders the requirement meaningless. He contends that the evidence shows only his guilt of robbery, insisting “the taking of the Oldsmobile made Survine no more vulnerable than the typical second-degree robbery victim. [Mims] took property from Survine that was the most readily available to him—*i.e.*, jewelry around Survine’s neck and the car keys in her hand. As the respective takings were all but simultaneous to each other, the theft of the keys placed the victim at no greater risk of harm than the taking of the jewelry.”

First, we disagree that taking Survine’s keys and car presented no greater risk of harm than taking her jewelry. As Survine testified, she was now left without a car in a neighborhood from which Mims had threateningly warned her to stay away.

Furthermore, Mims presents no authority supporting his implicit assumption that “immediate presence” must somehow be construed more narrowly in carjacking cases than in robbery cases. In fact, the legislative history of the carjacking statute fails to indicate that the Legislature intended to distinguish carjacking from robbery by requiring a closer proximity between the victim and the property taken. (See *In re Travis W.* (2003) 107 Cal.App.4th 368, 374 [“[t]he legislative history of the carjacking statute leaves no doubt that the new offense of carjacking is a direct offshoot of the crime of robbery”]; *People v. Vargas* (2002) 96 Cal.App.4th 456, 462 [“it appears the Legislature intended to treat carjackings just like robbery with two exceptions: (1) carjackings require an intent to either temporarily or permanently deprive the owner of the property whereas robbery always requires an intent to permanently deprive, and (2) carjackings only involve vehicles whereas robbery may involve any type of property”].)

A conviction for carjacking may subject the defendant to more serious punishment than a conviction for second degree robbery. (Compare § 215, subd. (b) [“[c]arjacking is punishable by imprisonment . . . for a term of three, five, or nine years”] with § 213, subd. (a)(2) [“[r]obbery of the second degree is punishable by imprisonment . . . for two, three, or five years”].) But, our Supreme Court has observed that “ ‘[c]arjacking is a particularly serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim, the perpetrator and the public at large.’ [Citations.]” (*People v. Hill* (2000) 23 Cal.4th 853, 859–860; see also *People v. Lopez* (2003) 31 Cal.4th 1051, 1061 [“the legislative history indicates that the Legislature was specifically concerned with the ‘considerable increase in the number of persons who have been abducted’ in their vehicles and the associated danger to the driver or passenger”].)⁷

⁷ In *People v. Hill*, *supra*, 23 Cal.4th 853, the court considered whether an infant could be the victim of carjacking even though too young to give or withhold consent. (*Id.* at p. 855.) In *People v. Lopez*, *supra*, 31 Cal.4th 1051, the court held that the felonious taking element of carjacking requires asportation or movement of the motor vehicle. (*Id.* at pp. 1054–1055.)

A serious potential for harm exists whenever there is a confrontation between the taker of a vehicle and the victim, who is then left without transportation. This risk of harm is not negated when the victim is confronted outside of the vehicle. Although the risk of harm may be greater when a victim is abducted in his or her vehicle,⁸ we cannot ignore the Legislature's statement that the taking must be "from [the possessor's] person *or immediate presence . . .*" (§ 215, subd. (a), italics added.) Thus, although section 215 may have been designed to address, in part, the problem of individuals being abducted in their vehicles, its plain language does not require that the victim be or remain in the vehicle at the time of the theft (§ 215, subd. (a)), and no appellate case has interpreted the statute in this fashion.

In fact, the legislative history on which Mims relies, makes clear the problem the Legislature was trying to solve by enacting the carjacking statute: "According to the author [of the legislative bill creating new carjacking statute], there has been considerable increase in the number of persons who have been abducted, many have been subjected to the violent taking of their automobile and some have had a gun used in the taking of the car. This relatively 'new' crime appears to be as much thrill-seeking as theft of a car. If all the thief wanted was the car, it would be simpler to hot-wire the automobile without running the risk of confronting the driver. People have been killed, seriously injured, and placed in great fear, and this calls for a strong message to discourage these crimes. Additionally law enforcement is reporting this new crime is becoming the initiating rite for aspiring gang members and the incidents are drastically increasing. [¶] Under current law there is no carjacking crime per se and *many carjackings cannot be charged as robbery because it is difficult to prove the intent required of a robbery offense* (to permanently deprive one of the car) since many of these gang carjackings are thrill seeking thefts. There is a need to prosecute this crime." (Assem. Com. on Pub. Safety,

⁸ For example, in *People v. Hill*, *supra*, 23 Cal.4th at page 860, it was noted that the infant, who remained in the car, was unbuckled from her car seat and rolled around the front of the moving vehicle.

3d reading analysis of Sen. Bill No. 60 (1993–1994 Reg. Sess.) as amended September 1, 1993, p. 1, italics added.) “[T]he legislative history demonstrates that carjacking was made a separate offense because of perceived difficulties with obtaining convictions under the robbery statute. [Citation.] In addition, because of the potentially violent nature of the taking and growing frequency of the crime, the Legislature made the punishment for carjacking greater than that for second degree robbery. [Citations.]” (*People v. Lopez, supra*, 31 Cal.4th at p. 1057–1058.)

We find that Mims’s conviction is consistent with both the evidence adduced at trial, and with the legislative intent of the carjacking statute.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.